

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHN GALES

APPELLANT

VS.

NO. 2007-KA-2253

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. The trial court did not abuse its discretion in allowing expert testimony regarding the manufacture of methamphetamine and to explain the ingredients and steps necessary to produce the drug.
- II. The trial court correctly denied Gales' Motion for New Trial.
- III. The trial court correctly denied Gales' Motion for Judgment Notwithstanding the Verdict as the prosecution proved beyond a reasonable doubt every element of the crimes with which Gales was charged.
- IV. The trial court correctly allowed evidence of Gales' conviction for conspiracy to possess drug paraphernalia with intent to manufacture methamphetamine pursuant to M.R.E. Rule 404(b) and the evidence was not admitted by way of impeachment and M.R.E. Rule 609 was not implicated.

STATEMENT OF THE CASE

On or about August 14, 2007, a Desoto County Grand Jury indicted John Gales for one count of the possession of two hundred fifty (250) dosage units of pseudoephedrine and/or ephedrine, knowing or under circumstances where one reasonably should know, the pseudoephedrine and/or ephedrine will be used to unlawfully manufacture a controlled substance, in direct violation of Section 97-1-1(a), Mississippi Code Annotated, as amended. Gales was also indicted for one count of conspiracy to possess pseudoephedrine in violation of Section 97-1-1(a), Mississippi Code Annotated, as amended. Gales was indicted as a habitual offender pursuant to Section 99-19-81, Mississippi Code 1972 Annotated, as amended. Gales was tried on or about December 6th and 7th of 2007 and was convicted of both counts. On December 10, 2007, Gales' attorney filed a Motion for J.N.O.V. and a separate Motion for New Trial. On December 12, 2007, the trial court denied both post trial motions and subsequently sentenced

Gales to five years for Count 1, possession of precursors, and five years for Count 2, conspiracy, with the two sentences to run consecutively. The instant appeal ensued.

STATEMENT OF THE FACTS

John Bienvenu, a pharmacist for Walgreens, testified that on July 5, 2005, a blond woman wearing blue jeans and a navy shirt came to the Walgreens in Horn Lake, Mississippi, and requested to purchase a 48 count box of Wal-phed (pseudoephedrine). (Tr. 130) Bienvenu was suspicious and called the Horn Lake Police Department to report the purchase. (Tr. 130) Bienvenu gave the dispatcher a description of the woman and a description of her vehicle, a white Mazda 626, with Arkansas tag 434JIF. (Tr. 130-1) The woman's identification reflected that she was from Arkansas. (Tr. 133)

Officer Riggs testified that he came in contact with John Gales and Denise Horn at about 5:30 p.m. on July 25, 2005 at the Walgreens located at Highway 51 and Highway 302. (Tr. 138) Riggs received a dispatch call to that location due to an individual who was in the store purchasing pseudo-phed and who had been to other stores to purchase pseudo-phed . The suspect was identified as a white female with blond hair wearing blue jeans and a navy blue shirt. As Officer Riggs arrived at Walgreens he observed a white passenger car getting ready to exit the lot. He observed a female passenger that appeared to match the description of the suspect. The passenger and the driver both looked over toward Riggs and took note of him pulling into the lot. (Tr. 141) Officer Riggs ran the tag on the vehicle and contacted dispatch to determine if the suspect had left the store. He was informed that the woman did leave the store in that vehicle. (Tr. 141) Riggs turned around on the vehicle and followed them onto Highway 51. He noticed a lot of movement by the driver and passenger in the vehicle. The driver was leaning toward the

woman in the passenger seat. Riggs initiated the stop and the woman continued her movements and appeared to be reaching down in front of her for something. (Tr. 142) Officer Riggs stopped the car in the Supervalu lot on Highway 302 at the corner of 51. (Tr. 142) Gales, who was driving the vehicle, got out of the car as soon as Officer Riggs stopped them. (Tr. 142) Riggs had Gales get back in the vehicle before he made his approach. Officer Riggs asked Gale for his driver's license, but Gales did not have any form of identification with him. (Tr. 143) Riggs had Gale exit the vehicle to try to determine his identification information and if he had a valid license. Gales appeared very nervous, pacing and raising his arms above his head. (Tr. 143)

Riggs asked Gales where he was coming from and Gales told him that he was coming from the casinos and that he was in route back to Arkansas. (Tr. 144) Riggs asked why they had stopped at Walgreens and Gales replied that he "didn't do anything wrong." (Tr. 144) Riggs then asked for consent to search Gales and the vehicle. (Tr. 144) Gales then gave consent for Officer Riggs to search him and the vehicle. Riggs searched Gales and did not find any contraband on him. Gales granted consent to search the car but also told Riggs that the car belonged to the passenger, Denise Horn. Officer Riggs then went to speak to Horn. Field Officer Fikes, who was riding with Riggs that day had gotten Horn out of the vehicle. (Tr. 144) Horn had some white pills in one of her hands that Riggs could see. She was also standing with her legs tucked together as if she was holding something in her pants that she didn't want to fall. (Tr. 145) Horn consented to be searched. Field Officer Fikes, a female officer, conducted the search. Riggs noted a bulge in the front of Horn's pants that did not appear to be normal. (Tr. 145) Officer Fike removed a white plastic bag containing a large amount of white pills from the front of Horn's pants. Riggs then read Horn her Miranda warning. (Tr. 146) Horn stated that she

understood her rights. Riggs then went back to Gales and read him his Miranda rights. Gales stated that he understood his rights. (Tr. 146)

During the search of the vehicle, Riggs found approximately 20 more white pills on the passenger seat and in the floorboard in front of the passenger seat. There were two blister packs between the passenger seat and the passenger door. (Tr. 146) Some of the pills had been removed from the blister packs. (Tr. 157) After the officers searched the vehicle, Riggs again spoke with Gales. Gales stated that Horn was his girlfriend and that he was driving her around because she had a suspended driver's license. He also stated that they were purchasing pills for an individual in Arkansas who was going to use them to manufacture methamphetamine. He stated that he would get meth in return for the pills they were purchasing. He further told Riggs that he and Horn had been at three or four stores that day. Gales told Riggs that he is an addict but that he does not cook meth. (Tr. 149)

Officer Todd Baggett testified that he arrived at the stop as a backup officer for Officer Riggs. He testified the officer he was training was also with him. When they arrived, Officers Riggs and Fikes already had Gales and Horn out of the car. The Pills were sitting on the hood of the car. Baggett transported Gales to the station for Riggs for booking. (Tr. 165) Officer Swan was also present in the car during transport. (Tr.168) During the course of transport, Baggett asked Gales "What happened back there?" Gales replied that he was collecting pills to take back to Des Arc, Arkansas to a cook who would use them to make methamphetamine. Gales would receive methamphetamine or money for the pills. (Tr. 166)

Detective Shawn May testified that he responded to the call on July 25, 2005 , and that he received the pseudoephedrine pills from Officer Riggs. He testified that he Mirandized Gales

spoke to him while he was seated in the back of a squad car. (Tr. 181) Gales told May that he came to the Horn Lake area because it was a familiar area for him to purchase amounts of pseudoephedrine for the manufacture of methamphetamine. He told May that he gets a small amount of money for his time and for driving and the person with him would get actual methamphetamine. Gales said they would deliver the purchased pseudoephedrine to a meth cook in Arkansas. (Tr. 182)

May testified that as a narcotics officer in the Horn Lake area that he frequently got calls about the purchase of pseudoephedrine for use in the manufacture of methamphetamine and that the area was referred to as "crystal alley." (Tr. 183) May testified that after Arkansas passed a law requiring purchasers of pseudoephedrine to produce identification and to sign a log book, in Mississippi, purchasers could still buy what they wanted and Horn Lake was one of the first places they reached when they came from Arkansas. (Tr. 184)

Detective May also took a statement from Horn who stated that she had to buy pills to sell to a meth cook. Gales told May that he drove to Horn Lake because he knew that it was a good area to buy pills. He told May that he got money for driving for the meth cook. (Tr. 200) Erik Frazure, a forensic scientist specializing in drug analysis, testified that the pills found in the car and found on the person of Denise Horn were 307 dosage units of pseudoephedrine. (Tr. 209)

As part of their case-in-chief, the prosecution submitted into evidence Gale's prior conviction in the Circuit Court of White County Arkansas for Conspiracy to Possess Drug Paraphernalia With Intent to Manufacture Methamphetamine. (Tr. 239) The prior conviction was submitted for the purpose of proving intent and knowledge, knowledge being a required

element in the crime. (Tr. 242-3) The trial court admitted only the conviction into evidence and not the details of the underlying crime. (Tr. 239) Gales' attorney objected that the document was not properly certified and objected pursuant to Rule 404 of the Mississippi Rules of Evidence. (Tr. 241) The Trial Court made a Rule 403 balancing on the record, finding that the probative value is not substantially outweighed by any prejudicial effect. (Tr. 243) The trial court specifically noted that the prior conviction was not introduced by way of impeachment. (Tr. 243)

Gales testified on his own behalf, acknowledging that he had passed multiple Walgreens and other pharmacies on his way to Horn Lake. He further testified that he knew that the law had changed in Arkansas to make it illegal to purchase pseudoephedrine for the purpose of manufacturing methamphetamine. He further stated multiple times that he was an addict and had been for several years. He testified that he used methamphetamine. (Tr. 289) He further testified that he had turned himself in to Arkansas authorities because they revoked his parole and probation because he had charges in Mississippi. He testified that he had spent 10 months in the county jail and six months in the Arkansas prison. (Tr. 289) Gales testified that he knew that Horn's boyfriend manufactured meth and drugs. (Tr. 290) He testified that as an addict, he liked to get to know the drug cook because the higher up the ladder you go, the cheaper and better the drugs are. And that because the cook makes the drug, he can sell it to you cheaper. (Tr. 292, 295) He testified that he knew that pseudoephedrine was used to manufacture methamphetamine. (Tr. 296)

SUMMARY OF THE ARGUMENT

In order to prove the elements of possession of a precursor for the purpose of manufacturing methamphetamine, the State was required to prove that Gales knew or should of

known that the pseudoephedrine was essential to the manufacture of methamphetamine and a description of the process was a necessary part of that proof. In Burchfield v. State, 892 So.2d 191 (Miss. 2004), the Mississippi Supreme Court held that the process of manufacture of methamphetamine was relevant and indeed necessary to the State's proof in a trial for possession of a precursor for the manufacture of methamphetamine. This issue is without merit.

The trial court correctly overruled Gale's motions for new trial and JNOV. Evidence of Gale's prior conviction for conspiracy to possess drug paraphernalia with intent to manufacture methamphetamine was introduced during the prosecution's case-in-chief and was correctly admitted by the trial court pursuant to M.R.E. Rule 404(b) to show knowledge and intent. The evidence was not introduced by way of impeachment and the requirements of M.R.E. Rule 609 are not implicated. This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

ARGUMENT

I. The trial court did not abuse its discretion in allowing expert testimony regarding the manufacture of methamphetamine and to explain the ingredients and steps necessary to produce the drug.

Gales was charged with possession of precursors to the manufacture of methamphetamine with knowledge that the precursors would be used for that purpose. Therefore, one of the elements necessary for the State to prove against Gales was that he knew or reasonably should have known that the pseudoephedrine would be used to manufacture a controlled substance. Testimony regarding the use of pseudoephedrine in the manufacture of methamphetamine was essential to proving the State's case. The State had to prove that Gales knew what such a

quantity pseudoephedrine was needed to manufacture methamphetamine and that it indeed would be used for that purpose.

In the case *sub judice*, the State offered Sergeant Kyle Hodge as an expert in the field of clandestine laboratories and methamphetamine. (Tr. 221) After a thorough voir dire examination, and hearing no objection from the defense, the Trial Court qualified Sergeant Hodge as an expert witness. (Tr. 225) The prosecutor asked Sergeant Hodge to “take us from start to finish on how you actually – what ingredients are actually needed for methamphetamine?” Sergeant Hodge then began to detail the four-step process of the manufacture of methamphetamine and the materials and ingredients necessary in the process. (Tr. 225) After Hodge completed the description of the first stage of the manufacturing process, the defense lodged a continuing objection as to relevancy to the Gales since he was not charged as a “cook.” (Tr. 226) The trial court overruled the objection, noting that the charge of possession of a precursor chemical where one reasonable should know that the chemicals would be used to manufacture a controlled substance required proof that the defendant knew or reasonably should know that the pills would be used in the unlawful manufacture of a controlled substance, methamphetamine. (Tr. 226) Sergeant Hodge then continued his testimony describing the manufacture of methamphetamine and testified that pseudoephedrine is essential to the process. (Tr. 229)

Burchfield v. State, 892 So.2d 191 (Miss. 2004) is directly on point. In *Burchfield*, an officer was called as an expert to testify about the manufacture of methamphetamine and to explain the ingredients and steps necessary to produce the drug. *Id.* at 195. Burchfield claimed that this testimony was prejudicial because he was not on trial for manufacturing

methamphetamine. Burchfield's counsel argued in a pretrial motion that the testimony was not probative. The prosecutor argued that the expert witness would be called to explain to the jury exactly how methamphetamine is manufactured and specifically the role of pseudoephedrine, which is the primary agent. *Id.* at 195. Defense counsel took the position that since Burchfield had not been charged with the manufacture of drugs, that any testimony about the manufacturing process would be unnecessary and would unfairly prejudice him. *Id.* at 195.

In *Burchfield* The Mississippi Supreme Court held:

However, one of the elements necessary for the State to prove against Burchfield was that he knew or should have known, that the ephedrine would be used to manufacture a controlled substance. Officer Cox was properly qualified to provide the testimony. Furthermore, he went no further than was necessary to demonstrate a link between the pseudoephedrine found in the car, Burchfield's statement that he intended to sell the pills, and the manufacture of a controlled substance. This assignment of error has no merit.

In order to prove the elements of possession of a precursor for the purpose of manufacturing methamphetamine, the State was required to prove that Gales knew or should of known that the pseudoephedrine was essential to the manufacture of methamphetamine and a description of the process was a necessary part of that proof.

Gales' counsel argues that Hodge's testimony unfairly painted Gales as a "drug addict" and deprived him of a fundamentally fair trial pursuant to the fourteenth amendment. (Appellant's Brief, p. 11) However, this evidence shows that pseudoephedrine is used in the manufacture of methamphetamine and that Gales had knowledge of that use. The testimony does not in any way go to Gales purported use of methamphetamine. Further, Gales repeatedly describes himself as an addict during his own testimony. It is difficult to see how this testimony

regarding the manufacturing process paints Gales as an addict and it is difficult to see how it prejudices him when he so freely admits his addiction in his own case in chief.

Appellant's Brief cites McGowen v. State, 859 So.2d 320 (Miss. 2003) and Tudor v. State, 299 So.2d 682 (Miss. 1974) for the proposition that Hodge's testimony was not admissible as proof of a crime distinct from that alleged in an indictment. However, the testimony in the case *sub judice* was not offered as proof that Gales committed another crime, rather it was offered to show that the pseudoephedrine he possessed was used in the manufacture of methamphetamine and that he had knowledge of that use. These cases are clearly inapplicable to the facts of the instant case.

As discussed above, Burchfield v. State, 892 So.2d 191 (Miss. 2004) is directly on point and the Supreme Court held therein that testimony of the process of manufacture of methamphetamine using pseudoephedrine was admissible since one of the elements necessary for the State to prove was that Burchfield knew or should have known that the pseudoephedrine would be used to manufacture a controlled substance. The Court in Burchfield further held that the officer was properly qualified to provide the testimony. This issue is without merit and the trial court should be affirmed.

II. The Trial Court correctly denied Gales' Motion for New Trial.

Gales alleges that the trial court erred in denying his motion for new trial. A motion for new trial challenges the weight of the evidence. Sheffield v. State, 749 So.2d 123, 127 (Miss. 1999). Reversal by an appellate court is proper only when the trial court has abused its discretion in failing to grant a new trial. *Id.* In reviewing a challenge to the weight of the evidence, the appellate court sits as a limited thirteenth juror, viewing the evidence in the light most favorable

to the verdict. Bush v. State, 895 So.2d 836, 844 (Miss. 2005). The reviewing court will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable justice. Id.

A motion for a new trial is based on the weight of the evidence and will be disturbed only when the verdict “is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.” Bush, 895 So.2d at 844. When reviewing a denial of a motion for a new trial, the reviewing court must take the evidence in a light most favorable to the verdict. Id. Such a motion is within the discretion of the court, “which should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.” Id. (quoting Amiker v. Drugs for Less, Inc., 796 So.2d 942, 947 (Miss.2000)).

In this case, the jury had before it evidence clearly showing Gales’ constructive possession of pseudoephedrine with the knowledge that it would be used for the manufacture of methamphetamine. Officer Riggs’ testimony establishes that Gales was driving Horn from store to store to purchase pseudoephedrine. Gales and Horn both took note of Riggs entering the parking lot as they were pulling out. Gales and Horn were both moving in the front seat of the car, Gales leaning in toward Horn as Officer Riggs followed them out onto the highway. After Riggs pulled them over, Gales got out of the car before Riggs could approach the vehicle, while Horn continued to appear to be reaching something in front of her on the passenger side. From this testimony, the jury could reasonably infer that Gales and Horn were attempting to hide something when they saw a police car approaching. When they were stopped, Gales attempted to stall the officer by getting out first, so that Horn could finish the job of hiding the contraband. Despite Gales’ argument that he did not know Horn had the pseudoephedrine and that he did not

possess it because it was on the passenger side of the vehicle, Horn's actions immediately prior to and at the time of the stop lead to the inference that Horn was fully aware of the contraband and was attempting to hide it. The jury could reasonably infer that he was therefor in possession of the contraband and conspiring with Horn to purchase the pseudoephedrine.

Further, Gales confessed to three separate officers that he and Horn were purchasing pseudoephedrine to take to a methamphetamine cook to exchange for drugs or money. Gales was driving because he did not have a driver's license or identification required to make the purchase. During cross examination the state, Gales testified that he was an addict and that addicts try to get close to the meth cooks so that they can get cheaper and better quality drugs. Horn also gave a statement that the pseudoephedrine was purchased for a meth cook who would give them drugs or money in exchange. It was for the jury to weight the credibility of the witnesses and the jury clearly found the testimony of the officers regarding Gales' statements at the time of the stop to be more credible than Gales' denials at trial.

Therefore, the verdict was not overwhelmingly against the weight of the evidence and the trial court properly denied the post-trial motions and the trial court's judgment of conviction and sentence should be affirmed.

III. The Trial Court correctly denied Gales' Motion for Judgment Notwithstanding the Verdict as the prosecution proved beyond a reasonable doubt every element of the crimes with which Gales was charged.

A Motion for JNOV implicates the sufficiency of the evidence. *Sheffield v. State*, 749 So.2d 123, 125 (Miss. 1999) The standard of review is well settled:

We must, with respect to each element of the offense, consider all

of the evidence - not just the evidence which supports the case for the prosecution - in the light most favorable to the verdict. The credible evidence which is consistent with the guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such the reasonable and fair-minded jurors could only find the accused not guilty.

Id. (quoting Gleaton v. State, 716 So.2d 1083, 1087 (Miss. 1998)).

Gales' argument on appeal is based on the fact that the pseudoephedrine was not actually found on him. About 20 of the 307 pills were found in the car on the passenger floor board, the passenger seat and two blister packs were found between the passenger seat and the passenger door. The rest of the pills were found on Horn, in her hands or in a bag stuffed in the front of her pants. Gales contends that the evidence points only to Horn, not to him.

In reviewing a trial court's denial of a motion for a directed verdict or a judgment notwithstanding the verdict, the reviewing court must look at the sufficiency of the evidence. Bush v. State, 895 So.2d 836, 843 (Miss.2005). The court must ask whether the evidence shows "beyond a reasonable doubt that [the] accused committed the act charged and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test[,] it is insufficient to support a conviction." Id. at 843 (quoting Carr v. State, 208 So.2d 886, 889 (Miss.1968)). Taking the evidence in the light most favorable to the verdict, the question is whether a rational trier of fact could have found all the elements of the crime beyond a reasonable doubt. Bush, 895 So.2d at 844 (quoting Jackson v. Virginia, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

The statute prohibiting the unlawful possession of precursor chemicals is found at Mississippi Code Annotated section 41-29-313(2)(c)(i) (Rev.2005), and provides:

[I]t is unlawful for any person to purchase, possess, transfer or distribute two hundred fifty dosage units or fifteen (15) grams in weight . . . of pseudoephedrine or ephedrine, knowing, or under circumstances where one should reasonably know that the pseudoephedrine or ephedrine will be used to unlawfully manufacture a controlled substance.

The State is required to prove each element of the indicted offense beyond a reasonable doubt. Hobson v. State, 730 So.2d 20, 28 (Miss.1998). In reviewing the evidence, an appellate court will accept as true the evidence that supports the verdict and will reverse only when convinced that the circuit court abused its discretion in failing to grant a new trial. Dudley v. State, 719 So.2d 180, 182 (Miss.1998); Smith v. State, 868 So.2d 1048, 1050 (Miss.Ct.App.2004). It is the responsibility of the jury to weigh and consider the conflicting evidence and evaluate the credibility of witnesses and determine which testimony is to be believed. Williams v. State, 427 So.2d 100, 104 (Miss.1983).

In this case, the jury had before it evidence clearly showing Gales' constructive possession of pseudoephedrine with the knowledge that it would be used for the manufacture of methamphetamine. Officer Riggs' testimony establishes that Gales was driving Horn from store to store to purchase pseudoephedrine. Gales and Horn both took note of Riggs entering the parking lot as they were pulling out. Gales and Horn were both moving in the front seat of the car, Gales leaning in toward Horn as Officer Riggs followed them out onto the highway. After Riggs pulled them over, Gales got out of the car before Riggs could approach the vehicle, while Horn continued to appear to be reaching something in front of her on the passenger side. From this testimony, the jury could reasonably infer that Gales and Horn were attempting to hide

something when they saw a police car approaching. When they were stopped, Gales attempted to stall the officer by getting out first, so that Horn could finish the job of hiding the contraband. Despite Gales argument that he did not know Horn had the pseudoephedrine and that he did not possess it because it was on the passenger side of the vehicle, Horn's actions immediately prior to and at the time of the stop lead to the inference that Horn was fully aware of the contraband and was attempting to hide it. He was therefor in possession of the contraband and conspiring with Horn to purchase the pseudoephedrine.

Further, Gales confessed to three separate officers that he and Horn were purchasing pseudoephedrine to take to a methamphetamine cook to exchange for drugs or money. Gales was driving because he did not have a driver's license or identification required to make the purchase. During cross examination the state, Gales testified that he was an addict and that addicts try to get close to the meth cooks so that they can get cheaper and better quality drugs. Horn also gave a statement that the pseudoephedrine was purchased for a meth cook who would give them drugs or money in exchange.

Gales was driving the vehicle from pharmacy to pharmacy and was clearly aware of the presence of the pseudoephedrine in the car as evidenced by his behavior when Officer Riggs pulled behind the vehicle and subsequently pulled Gales over at the Supervalu. He confessed to three officers that he and Horn were buying the drugs to give to a meth cook in exchange for drugs and/or money. The elements of possession and knowledge that the precursor would be used for the manufacture of methamphetamine were clearly proved by those facts.

From the evidence presented at trial, the state proved all the necessary elements of the crime beyond a reasonable doubt. The evidence was sufficient to support the verdict and the trial

court properly denied the post-trial motions and the trial court's judgment of conviction and sentence should be affirmed. This assignment of error is without merit.

IV. The Trial Court correctly allowed evidence of Gale's conviction for conspiracy to possess drug paraphernalia with intent to manufacture methamphetamine pursuant to M.R.E. Rule 404(b) and the evidence was not admitted by way of impeachment and M.R.E. Rule 609 was not implicated.

Gale argues that the trial court improperly admitted evidence of his prior criminal conviction for conspiracy to possess drug paraphernalia with intent to manufacture methamphetamine. methamphetamine.” Gale alleges that this evidence was admitted pursuant to Rule 609 and that the *Peterson* factors are therefore implicated. However, this evidence was admitted during the prosecution's case in chief pursuant to Rule 404(b). (Tr. 241-244) It was not introduced by way of impeachment and Rule 609 does not apply. (Tr. 243)

Evidentiary issues are decided under an abuse of discretion standard. *Lindsey v. State*, 754 So.2d 506, 511 (Miss.Ct.App.1999). A case may be reversed based on the admission of evidence only if the admission results in prejudice and harm or the admission affects a substantial right of a party. *Smith v. State*, 839 So.2d 489, 495 (Miss.2003).

Character evidence is not admissible to prove that one acted in conformity therewith. M.R.E. 404(a). Evidence of another crime or prior bad act is not usually admissible. *Ballenger v. State*, 667 So.2d 1242, 1256 (Miss.1995). However, according to Rule 404(b), evidence of other crimes or bad acts may be admissible to prove identity, knowledge, intent, motive or to prove scienter. *Simmons v. State*, 813 So.2d 710, 716 (Miss.2002) (citations omitted).

Upon finding that the evidence is admissible under M.R.E. 404(b), the court must still

consider whether the evidence passes the Mississippi Rule of Evidence 403 filter. Simmons, 813 So.2d at 716 (Miss.2002) (citations omitted). Mississippi Rule of Evidence 403 provides that otherwise admissible evidence may be excluded where the risk of undue prejudice substantially outweighs the probative value of the evidence.

Here, the State did not offer evidence of Gale's prior conviction for conspiracy to possess drug paraphernalia with intent to manufacture to show Gale's character. Instead, the State claimed at trial that this evidence was presented to show Gale's knowledge of this particular

The evidence of the prior conviction had no prejudicial effect. Gale does not offer any proof of how his prior conviction's probative value is outweighed by its potential prejudice. Rather, he merely asserts that he was prejudiced. As stated, the trial judge found that Gale's prior conviction was relevant under M.R.E. 404(b) because it proved that Gale had knowledge concerning the use of precursor chemicals or drugs in the manufacturing of methamphetamine.

The trial judge expressly considered Rule 403 and weighed the probative value of the evidence against its prejudicial effect. (Tr. 241-4) The trial court did not err in admitting the evidence of Bone's prior conviction under Rule 404(b). Therefore, this issue is also without merit.

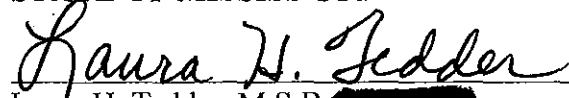
CONCLUSION


Gale's assignments of error are without merit and the verdict of the jury and the rulings of the trial court should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:


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Honorable John W. Champion
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